FILED
OCT 12 1957
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 56

GERALD WILLIAM NELSON and
JOHN E. HATTON,

Petitioners,

vs.

STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Court of Tennessee (R. pp. 53-61) is reported in 292 S.W. (2) 727.

Jurisdiction

The judgment of the Supreme Court of the State of Tennessee was entered July 20, 1956 (R. pp. 61-62).

Motion for leave to proceed in *forma pauperis* and petition for writ of certiorari filed September 14, 1956. Motion was granted (R. pp. 63-64). Certiorari granted, limited to the Jury question, December 17, 1956. The jurisdiction of this Court rests on the due process clause and the Fourteenth Amendment to the Constitution.

Question Presented

Whether the Supreme Court of the State of Tennessee erred in failing to reverse and remand this cause after finding as a fact that the State had erroneously been allowed to challenge for cause, some fourteen prospective jurors on the ground that they were or had been members of labor unions. The Supreme Court of Tennessee finding is on Record pages 58 and 59.

Statutes Involved

The Fifth and Sixth Amendments to the Constitution of the United States; Section 1, of the Fourteenth Amendment to the Constitution of the United States; Title 22, Volume IV, Tenn. Code Annotated Sections 22-101 and 22-106, providing the qualifications and exemptions of jurors; Article I, Section 6 of the Constitution of Tennessee, and Section 40-2510 Tennessee Code Annotated.

Amendment 5.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 22-101, Tennessee Code Annotated.

Basic qualifications.—Every person of the age of twenty-one (21) years, being a citizen of the United States, and a resident of the State of Tennessee, and of the county in which he or she may be summoned for

jury service for a period of twelve (12) months next preceding the date of such summons, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the express provisions of the code. A woman shall have the option of serving or not when summoned to jury duty. (Code 1858, Sec. 4002, deriv. Acts 1809 (Sept.) ch. 119, sec. 2; 1835-1836, ch. 6, Sec. 8; impl. am. Acts 1867-1868, ch. 31, sec. 1; Shan., Sec. 5813; Code 1932, sec. 10006; Acts 1951, ch. 71, sec. 4.) Texts; History of a Lawsuit (7th Ed. Gilreath), secs. 323, 739; Law Reviews. Criminal Law and Procedure (W. D. Warren), 6 Vand. L. Rev. 1179. Jury Panels in Federal Courts, 22 Tenn. L. Rev. 203; Selecting a Trial Jury in Tenn., 22 Tenn. L. Rev. 220. Cited: Brewer v. Jacobs (1884), 22 Fed. 217.

Section 22-106, Tennessee Code Annotated.

Discharge of unqualified jurors.—The Court may discharge a grand or petit juror from service who does not possess the requisite qualifications, or who is exempt or disqualified from such service, or for any other reasonable or proper cause, to be judged of by the court. That a state of mind exists on his part toward law enforcement or which will prevent him from acting impartially, shall constitute such cause. (Code 1858, sec. 4007 Shan., Sec. 5818; mod. Code 1932, sec. 10012.) Law Reviews. Selecting A Trial Jury In Tenn., 22 Tenn. L. Rev. 22; Cited; Jenkins v. State (1897), 99 Tenn., 569, 42 S.W. 263; Turner v. State (1913), 128 Tenn., 27, 157 S.W. 67.

Article I, Sec. 6, Constitution of Tennessee.

That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

Section 40-2510, Tennessee Code Annotated.

Peremptory challenges.—In the trial of criminal cases, the peremptory challenges of jurors shall be as follows: In the trial of capital cases, the state shall be allowed six (6) for each defendant and each defendant shall be allowed fifteen (15) peremptory challenges. In the trial of all other felonies, the state shall be allowed for each defendant four (4) and each defendant shall have eight (8) peremptory challenges. In the trial of misdemeanors, the state for each defendant and each defendant shall be allowed three (3) peremptory challenges. (Acts 1909, ch. 545, sec. 1; Shan., secs. 5825, 5826; mod. Code 1932, Sec. 10020.)

Statement

The assignment of error pertaining to the manner of the Court's discharging qualified jurors for the sole reason that they were members of a union organization is found on Transcript of Record, pages 29-35.

This assignment of error was sustained by the Honorable Supreme Court of the State of Tennessee in its opinion (R. p. 59), but the Honorable Court held that this violation of petitioners' Constitutional and Statutory rights was harmless error (R. p. 60), and accordingly applied the harmless error statute, which is as follows:

Sec. 27-117, Tenn. Code Annotated—
Sec. 10654 of the Code of 1932.

No reversal or new trial for errors not affecting the results of the trial.—No verdict or judgment shall be set aside or new trial granted by any appellate court, in any civil or criminal cause, on the ground of error in the charge of the judge to the jury, or on account

> of the improper admission or rejection of evidence, or for error in acting on any pleading, demurrer, or indictment, or for any error in any procedure in the cause, unless, in the opinion of the appellate court to which application is made, after an examination of the entire record in the cause, it shall affirmatively appear that the error complained of has affected the results of the trial.

With the exception of the instant case, this Act has not been applied wherein fundamental or constitutional rights of the accused were involved. The following Tennessee cases hold: Errors affecting constitutional rights call for a reversal, and are not saved by the statute. *Munson* v. *State*, 141 Tenn. (14 Thomp.) 522, 213 S.W. 916; *Johnson* v. *State*, 152 Tenn. (25 Thomp.) 184, 274 S.W. 12, and cases cited: *Upchurch* v. *State*, 153 Tenn. (26 Thomp.) 198, 281 S.W. 462; *Northcross* v. *Loew's Memphis Theatre Co.*, 3 Tenn. App. 51

In its application of this statute, to this case, the Supreme Court of the State of Tennessee gave as its reasons for applying that this act is necessitated by the frequent reversal for numerous errors because the state could, with difficulty, show that errors were not prejudicial, that is, prove a negative and thus the expense of the courts was greatly increased by repeated new trials (R. p. 61).

Summary of Argument

That the petitioners' rights were violated in excluding from the jury panel fourteen (14) talesmen who were qualified under the law for jury service, their names having been drawn from the jury box and they having been summoned as jurors to try the case against petitioners. That it was error for the Court in the presence of all prospective

jurors to excuse the aforesaid fourteen solely and only because they were members of a labor union. This error was conceded as such by the state Supreme Court and it being further stated that the rule of law in Tennessee was that such error was of substance and called for a reversal. The Supreme Court of the State of Tennessee, however, without overruling its previous decisions, but for the purpose of this case, placed a different construction on the rights of these petitioners, denying them the equal protection of the law and due process of law as it has been defined in Tennessee:

The clear intention of the right is expressed in Section 40-2510 of the Code of Criminal Procedure, T.C.A. and it has been held to be reversible error since the statute was enacted to allow the State to exceed the number of peremptory challenges authorized by the statute. To hold otherwise against these petitioners certainly discriminates against them, whatever be the reason.

ARGUMENT

I

A Denial of Equal Protection of the Law in the Selection of a Trial Jury Is Within the Plain Meaning of the Words of the Statute and Violates Both the Federal and State Constitutions. No Rule of Statutory Construction Justifies a Disregard of the Obvious Purpose of the Legislative Act Which Prevents an Arbitrary Exercise of the Powers of Government.

The intentions and purposes expressed in the Fifth Amendment to the Constitution is that of equality, and the word "person" is not limited or restricted. There is no classification of guilty or not guilty, but is to be applied to all the citizens alike.

The Fourteenth Amendment to the Constitution of the United States forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances. *In re Kemmler* (1880), 136 U.S. 436, 34 L.Ed. 519, 10 Sup. Ct. 930.

In construing the Fourteenth Amendment, the Courts have held: This amendment does not impair the police powers of the State. *Slaughter-House Cases* (1873), 83 U.S. 36, 21 L.Ed. 394; *Barbier* v. *Connelly* (1885), 113 U.S. 27, 28 L.Ed. 923, 5 Sup. Ct. 357; *Powell* v. *Penna.* (1888), 127 U.S. 678, 32 L.Ed. 253, 8 Sup. Ct. 992, 1257; *Budd* v. *New York* (1892), 143 U.S. 517, 36 L.Ed. 247, 12 S.Ct. 930.

Due process of law and equal protection of the laws are secured if the law operates on all alike and does not subject the individual to an arbitrary exercise of the powers of government. *Duncan* v. *Missouri* (1894), 152 U.S. 377, 38 L.Ed. 485, 14 Sup. Ct. 570.

Rights guaranteed by this amendment are protected against state action whether action is by legislature, executive, judicial or administrative authority. *International Union of Mine, Mill and Smelter Workers* v. *Tennessee Copper Co.* (1940), 31 Fed. Supp. 1015.

Police power reserved to the state by Amendment 10 is subject to provisions of this amendment. *Gray* v. *University of Tennessee* (1951), 97 Fed. Supp. 463.

The prohibitions of this amendment extend to all acts of the state, whether through its legislative, executive or judicial authorities. *Scott* v. *McNeal* (1894), 154 U.S. 34, 38 L.Ed. 896; 14 Sup. Ct. 1108; *Pacific Gas Imp. Co.* v. *Ellert* (1894), 64 Fed. 421; *N. C. and St. L. Ry. Co.* v. *Taylor* (1898), 86 Fed. 168; *Huntington* v. *New York* (1902), 118 Fed. 683.

This amendment secures every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *Sunday Lake Iron Co.* v. *Wakefield Tp.* (1918), 247 U.S. 350, 62 L.Ed. 1154, 38 Sup. Ct. 495.

This amendment prohibits the states from denying to any person within their jurisdiction the equal protection of the laws, but adds nothing to the rights of one citizen as against another. *United States* v. *Cruikshank* (1876), 92 U.S. 542, 23 L.Ed. 588.

Equal protection of the laws requires only that the same means and methods be employed impartially to the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. *Camden Fire Ins. Assn.* v. *Haston* (1925), 153 Tenn., 675, 284 S.W. 905.

The phrase "equal protection" requires that all persons shall be treated alike under like circumstances and conditions, both as to privileges conferred and as to liabilities imposed. *Mascari* v. *International Brotherhood (A. F. L.) Local Union No. 667* (1948), 187 Tenn., 345, 215 S.W. (2d) 779.

The rule of law with reference to and applicable to the facts in the instant case is found in 190 Tenn. Reports in the case of *Vines* v. *State* (being the third assignment of error). The Court's opinion by the Chief Justice with reference to the Court's excluding a qualified juror at a trial is as follows:

> The assignments of error which complain of the action of the trial judge in excluding one James Edwards from service on the jury and for permitting inflammatory remarks by the District Attorney Gen-

eral must be sustained. The juror, James Edwards, was a Negro. When he was called around and examined upon his voir dire the State had exhausted all its peremptory challenges. The juror stated he did not know the defendant or Mrs. Foster and had no opinion in the case. The Attorney General challenged him peremptorily. Thereupon, the trial judge remarked, "I don't think you have got any left. I think you have exhausted your challenges, General." Counsel for defendant, Mr. Denman, "We accept him." The Court: "The Court will excuse him. Excused by the Court." The defendant excepted. We think this action of the trial judge was clearly erroneous because it amounted to allowing the State an extra peremptory challenge, the juror being in all respects qualified to serve upon the jury. It was prejudicial to the right of the accused.

We are not unmindful of the fact that the trial courts have a wide discretion in passing upon the qualification of jurors in both civil and criminal cases. In exercising this discretion the presumption is always indulged that the court has but one purpose in mind, which is to assure a fair and impartial trial before an unprejudiced and competent jury. By Code Section 10012, it is provided that "the court may discharge a grand or petit juror from service who does not possess the requisite qualifications, or who is exempt or disqualified from such service, or for any other reasonable or proper cause, to be judged of by the court."

The basic requirement for jury service in Tennessee is that a venireman be a householder or freeholder in the county and State and "a good and lawful citizen." No contention is made here that Edwards was disqualified for any cause. If the trial judge could, upon his own motion, and without stating any cause, dis-

charge the juror he could arbitrarily discharge any number of venire-men who are qualified for service and by so doing add to the number of peremptory challenges by the State, in plain violation of law. The repetition and continuation of such a practice would result in an undisguised mockery of our system of jury trial. The defendant was entitled to have the juror in question occupy a seat in the jury box, and the court's action in excluding him without cause constitutes reversible error.

In one of the early criminal cases decided in 1878, by the Supreme Court of the State of Tennessee, the case of *Wiggins* v. *State*, reported in 69 Tennessee, page 736, the Court held:

> Challenges allowed the State.—In the trial of a criminal prosecution in which the peremptory challenges of jurors by the state is limited to four, it is error to allow the state to exceed that number although two defendants are being tried under the same indictment; where the juror thus challenged was accepted by the defendants and the defendants afterwards exhausted their challenges before the jury was obtained.

This rule of law has been strictly adhered to.

In another case, *Foutch* v. *State*, decided in 1898, and reported in 100 Tenn. Reports at page 335, in construing the statute with reference to peremptory challenges in criminal cases, the court held:

> It is reversible error to allow the state exceeding four peremptory challenges where the offense charged is not capital but of or above petit larceny. Citing Wiggins v. State, supra, and construing the Acts of 1875 and 1883.

Thus, the Honorable Supreme Court of the State of Tennessee was in error in allowing or calculating that the State was entitled to increase the number of peremptory challenges exercised by the State from thirteen (13) to twenty-seven (27), which includes the fourteen (14) jurors excused by the Court because they were members of labor organizations, at the instance of the state, and the thirteen (13) jurors that the State excused peremptorily without a reason and without cause.

There are a number of qualifications for a juror defined in the statutes of the State of Tennessee and this enumeration by statute of certain grounds for challenge for cause is further elaborated in allowing the Court judicial discretion, that is, in the judicial field as was practiced under the common law rule, and while the trial court's discretion in the matter is extensive, there is a limit upon which such discretion may not go. See 50 C.J.S. p. 946, Sec. 208(b) citing *State* v. *Rhodes*, 282 N.W. 540 superseded 288 N.W. 98, 227 Iowa, 332, Cert. denied; *Rhodes* v. *State of Iowa*, 60 S.Ct. 980, 310 U.S. 626; 84 L.Ed. 1398.

And the statutory discretion of the Trial Court with respect to the competency of a juror cannot be so exercised so as to change in any degree the essential qualifications of a juror. Quoting *Scrivner* v. *State*, 75 Pac. 2d 1154; 63 Okla. Crim. 418; Cited under section 208; 50 C.J.S. page 946, Sec. 208(b).

Section 229, C.J.S. Volume 50, 946 is as follows:

> Membership in Association, or Organization.—The fact that a person is a member of a particular order, association, or other organization does not, as a general rule, of itself render such person incompetent as a juror.
>
> Mere membership in a particular order or organization is not ground for challenge for cause and does not

render a member incompetent as a juror, at least where it is not shown that such order or organization is unlawful in its object or purpose, or that it is in some manner interested in or connected with the prosecution of the case at bar. E.g. Allen v. State, 23 P. 96, 28 Okla. Crim. 373; Thomas v. State, 272 S.W. 149, 100 Tex. Crim. 114; State v. Griffith, 279 S.W. 135, 311 Mo. 630; State v. Logan, 126 S.W. 2d 256, 344 Mo. 351; 122 A.L.R. 417; State v. Gartland, 263 S.W. 165; 304 Mo. 87; Stevens v. State, 276 S.W. 228, 101 Tex. Cr. 220; McCauley v. State, 9 S.W. 2d 236, 177 Ark. 1031; Rose v. Magio, 124 So. 296, 220 Ala. 120; State v. Griffith, 279 S.W. 135, 311 Mo. 630; State v. Lohm, 125 S.W. 758, 97 W.Va. 652.

Where no labor union was interested in result of former employee's action for assault and battery allegedly committed by employees, court's refusal to allow juror who was affiliated with union to be stricken for cause was not error. Alabama Fuel and Iron Co. v. Powaski, 166 So. 782, 232 Ala. 66.

Subject to qualification or limitation because of the existence of a pecuniary interest, under rules discussed, supra, sec. 215, as a general rule a person is not incompetent to act as a juror in a trial for a particular offense because he is a member of an association organized for the prosecution or prevention of such offenses, unless the association is in some manner connected with or interested in, the prosecution of the particular case or the juror is obligated to do all in his power to secure convictions: Carnaggio v. State, 109 So. 732, 143 Miss. 694, 35 C.J. page 332, note 23; Remus v. U. S., CCA, Ohio, 291 Fed. 501; 35 C.J. page 332, note 24; Counts v. State, 181 S.W. 723, 78 Tex. Cr. 410.

A juror is not incompetent merely because he and one of the parties are members of the same religious denomination, church, organization or fraternal order. Sebring v. Weaver, 42 Pa., Super. 588, 35 C.J. page 332, note 27; Searle v. Springfield Roman Catholic Bishop, 89 N.E. 809, 203 Mass. 493, 25 L.R.A. N.S. 992, 17 Ann. Cas. 340; 35 C.J. page 332, note 28; State v. Dunn, 109 So. 56; 161 La. 532; Dunn v. State of Louisiana, 47 S.Ct. 344, 273 U.S. 656, 744; 71 L.Ed. 825; Jones v. Wright, Civ. App. 92 S.W. 1010; 35 C.J. page 332, note 29; Reed v. Peacock, 82 N.W. 53, 123 Mich. 244; 81 Am. S.R. 194, 49 L.R.A. 423; 35 C.J. page 332, note 30; Purple v. Horton, 13 Wend. 9, 27 Am. D. 167; 35 C.J. page 332, note 31.

Affiliation with a political party constitutes neither a qualification nor a disqualification for jury service. On an election contest a juror cannot be challenged for cause because he belongs to a particular political party, or voted against one of the contesting parties. State v. McGee, 83 S.W. 2d 98; 336 Mo. 1082; Gray v. State, 49 S.W. 699, 19 Tex. Civ. App. 521.

In the matter of selecting a jury in a criminal action and due process of law, see Spies v. Ill., 123 U.S. 131; 31 L.Ed. 80; 8 S.Ct. 21-22.

Where persons are wrongfully excluded from service on trial jury by reason of race or color, see Carter v. Texas, 177 U.S. 442; 44 L.Ed. 839; 20 S.Ct. 687; Rogers v. Ala., 192 U.S. 226; 28 L.Ed. 417; 24 S.Ct. 257.

The phrase "equal protection of the law" is not susceptible of exact definition. If these must be decided upon the facts involved, the guiding principle most often stated by the courts is that the Constitutional guaranty requires that all persons shall be treated alike, under like circumstances and continues both in the privilege conferred and the liability imposed. Mas-

cari v. International Brotherhood of Teamsters, etc., 187 Tenn. (23 Beelr) 345; 215 S.W. 2d 779.

Section 40-2510 T.C.A. in its provision presages each statement of the number of peremptory challenges allowed by the word shall, thus legally fixing the number of peremptory challenges for each party in a criminal case.

"Shall" as used in statutes, contracts, or the like.—This word is generally imperative or mandatory. *McDunn* v. *Roundy*, 191 Iowa 976; 181 N.W. 453-454; *Bay State Ry. Co.* v. *City of Woburn*, 232 Mass. 201; 122 N.E. 268; *U. S.* v. *267 Twenty-dollar Gold Pieces*, 255 Fed. 217-218; *Baer* v. *Gore*, 79 W.Va. 50; 90 S.E. 530-531; L.R.A. 1917 B. 723.

In common or ordinary parlance and in its ordinary significance the term "shall" is a word of command and one which has always or which must be given a compulsory meaning, as denoting obligation. It has the invariable significance of excluding the idea of discretion and if the significance of operation to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or when a public interest is involved, or where the public or persons for rights which ought to be exercised or enforced, unless a contrary intent appears. *People* v. *O'Rourke*, 124 Calif. Apps. 752; 13 Pac. 2d 989-992.

The reason for the rule is that the right is given to the defendants, although they may be tried together, yet the judgments may be different. Each defendant is on trial and must stand or fall ordinarily as if tried alone. It is only the natural and reasonable construction of the statute to hold that every defendant should have the benefit of its provisions.

By the Constitution of the United States, Sixth Amendment, the accused was entitled to a trial by an impartial

jury. A juror to be impartial, must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt. 155 B.

He further says that a principal cause of challenge is "so-called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers." *Id.* 156 B.

Or, as stated in Bacon's Abridgement, "It is grounded on such a manifest presumption of partiality, that if found to be true, it unquestionably sets aside the juror or jurors." Bac. Abr.; Tit. Juries, E. 1.

If the truth of the matter alleged is admitted, the law pronounces the judgment, but if denied, it must be made out by proof to the satisfaction of the court or the triers. *Id.* E. 12.

To make out the existence of the fact, the juror who is challenged may be examined on his *voir dire* and ask any question that does not tend to his infamy or disgrace.

A peremptory challenge is an objection to a juror for which no reason need be given and upon which the Court must exclude him. There is not and cannot be any question "of good cause" about this challenge.

For a defendant to take advantage of an error in the exercise of a peremptory challenge it is necessary that his right to peremptory challenge has been exhausted. See *Hopt* v. *Utah*, 120 U.S. 430; 7 Supreme Court, 614; 30 L.Ed. 708; *Needham* v. *U. S.*, 73 Fed. 2d 1.

In this cause the petitioners exhausted their challenges. Exceptions were duly made and entered. The points were relied on for appeal, and the appellate court agreed that the challenge of the fourteen prospective jurors by the State was error, yet, by its decision, discriminated against

the petitioners and against all union men by refusing them the privileges of all other citizens of the state, in the matter of jury service, and of all other defendants of the state who were union members in the matter of selecting a jury for the purpose of a trial of a criminal case, either in the matter of the reason given by the Court at the trial as being for cause, that is, that any member of any labor organization was *per se* disqualified to sit as an impartial juror in the trial of a case in any way connected with a labor dispute, even though the prospective juror was qualified according to the law of the case, or that those fourteen jurors unlawfully discharged, be charged as peremptory challenges, then and in that event, the state is allowed to exceed its peremptory challenges by three or more which has always been held to be a reversible error in criminal trials in the State of Tennessee as heretofore set out. See *Vines* v. *State; Wiggins* v. *State* and *Foutch* v. *State, supra.*

Thus, this holding denied the petitioners equal protection of state laws and of Federal Laws, to which they were entitled. See *Lucy, et al.* v. *Adams*, 350 U.S. 1, 76 S.Ct. 33. This denial of equality under the law is in violation of the statutes and the Constitution of the State of Tennessee and the Constitution of the United States.

II

Historical Background of the Right of Impaneling of the Jury Demonstrates the Purposes, Rights and Rules Pertaining to the Selection of Jurors and the Prohibitions of Violating Those Rights.

By our national Constitution the trial of all crimes excepting cases of impeachment shall be by jury. No person shall * * * be deprived of life, liberty or property without due process of law. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial by an impartial jury. Doubtless these provisions operate co-extensively with the national jurisdiction.

The provision requiring due process of law was in 1868, extended by an amendment to bind the states. This provision already is in the Constitution of the State of Tennessee and in criminal cases, by all opinions, it secures to defendants, as did the like words in Magna Carta, those fundamental rights of trial which previous usage has established.

Since both the national and state constitutions and the state law of Tennessee, including the interpretations of the law applicable are to be interpreted together, the only construction giving effect to these provisions of the Constitution is that the rights pertaining to the qualifications, etc., of petit jurors are fundamental rights.

Under the subject, "qualifications of jurors" there has been catalogued in Tennessee, the following rules:

1. Freedom from bias of near relationship. This relation, either by affinity or consanguinity.

2. Bias because of other civil and social connections.

3. A general bias for or against a prisoner.

4. That the juror has a pecuniary interest in the result of the cause.

5. Bias as to the prisoner's guilt.

6. The juror having already in some other capacity, passed upon the question involved.

7. Bias from views of the law, that is, biased against the particular crime or that it was not a crime to do the thing charged, or a juror would be incompetent under this rule who would not convict or render a verdict on circumstantial evidence, etc.

8. The juror's connection with the prosecution or defense of a like offense.

9. The technical qualifications required by the state statutes that he not be a practicing attorney, etc.

10. Qualifications of freehold and the like. The Tennessee rules is that he must be a householder or a free-holder.

11. Residence in the County and State. He must be a citizen of the state and county for twelve months before service by statute.

12. Alienage. This is removed in Tennessee by naturalization.

13. Infamy.

14. Want of mental capacity and the like, including deafness, blindness, etc.

15. Personal exemption. Minister of Gospel, Doctors, the aged, and certain professional men.

The law, to be effectual, must consider that jurors are men with the common imperfections of mankind. A purified understanding and mental capacity that moves with the evidence but not otherwise. The common law rule as defined and set out in the statutes and our Constitutions must be interpreted in the light of these facts, and a disqualification of bias to prevail must be of some standard magnitude dictated by some practical system. To seek a jury of perfect men would be to seek an impossible jury which would, in effect, be simply to forbid the wheels of justice to move.

The impaneling of the trial juror in Tennessee is from a list embodying the names of the jurors kept in a jury box by a jury commission in each county and from this jury

box the panel is drawn by the Court. Each juror who is listed as a venireman is interrogated by the Court as to his legal and lawful qualifications, under oath on the *voir dire*.

If the Court ascertains in this examination that the juror is qualified under the law, the juror is then tendered first to the state for questionin, and then when passed by the state, to the defense for questioning. This was the procedure followed by the Court in the case at bar. There are two kinds of means of challenge available to each litigant, one being a challenge for cause, that is that the prospective juror in answering questions propounded, indicated by his statement, incompetence or disqualifications that would prevent him from being a legal juror. There is no limit as to the number of jurors purged from the panel by this means. The other method of challenging under the state practice, is that of peremptory challenge.

A peremptory challenge is one which the law accepts without any reason given. In this cause, there were three defendants and the state was allowed eight (8) peremptory challenges for each defendant, making a total of twenty-four (24) and the defendants were allowed twelve peremptory challenges for each of them, making a total of thirty-six (36) challenges. The defendants-petitioners, Nelson and Hatton, exhausted their peremptory challenges. The State used thirteen of its peremptory challenges and the Court, upon motion of the State for challenge for cause because they were members of a labor union, excused fourteen (14) otherwise qualified jurors because they were members of labor unions.

The state, altogether, was allowed and did challenge twenty-seven jurors without a justifiable reason, that is, peremptorily, though all of the jury selected to try the cause knew of the court's attitude toward members of labor

unions, because under Tennessee law, the jury must be present in the court room at all times while selections are being made.

By the Ancient Common Law, "the king might challenge peremptorily as many as he thought fit, of any jury returned to try any cause in which he was a party." Later, in 1305, this was changed by 33 Edw. 1, stat. 4. It provided that in all "inquests" before the courts, "wherein our lord the king is party," though it should be alleged on behalf of the king "that the jurors of those inquests or some of them be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court." 2 Hawkins P.C., c. 43, Sec. 2; U. S. v. Douglass, 2 Blatch. 207.

This would seem to end peremptory challenges, but the Courts by construction, leaning to the Crown, rendered this statute almost nugatory. Thus, on a challenge from the king "before a panel is perused," says Hawkins, no cause for it need be shown "till the whole panel be gone through and it appear that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the king to show cause, presently challenge" "touts paravaile," he "shall be first put to show all his causes of challenge before the king need to show any." 2 Hawk. P.C., c. 43, sec. 3. Hence the practice, transmitted to us as common law.

Under the statute, peremptory challenge of jurors in Tennessee is limited, but is permitted in compensation for the abolished right of passing, standing aside, and challenge

as existed at common law, and there is a balance provided for by the statute in allowing defendants to peremptorily challenge a limited number of jurors. This right of challenge having been permitted at common law, is now available by statute in all trials for criminal offense. Though originally it was admitted only in favor of life, it is now available under the statute in all felonies, though the punishment is not death. The number and to a considerable extent, the right itself is regulated by the statutes.

> If the court wrongly overrules a prisoner's challenge for cause, and then he challenges peremptorily the obnoxious juror, who thereby is in fact excluded, the wrong has done him no injury and he is entitled to no redress if, when the trial panel is fully made up, he has peremptory challenges remaining unused. Citing a long list of cases in Bishop's New Criminal Procedure, Vol. 2, page 742, sec. 943. The rule is otherwise if his right of peremptory challenges has been diminished.

In this cause, there were two cases tried together and the petitioners, Nelson and Hatton, had exhausted their peremptory challenges (R. p. 17).

If the statute provides that the court may do thus and so, then there is always a conditioned application of the statute, but if the statute or constitutional provision is that the governmental agency shall or shall not do thus and so, then the statute or constitutional provision is mandatory and the court does not have discretion in the application of this rule of law thus defined.

While the formal history of those provisions of the Constitution and of the Legislative Acts in aid of the Constitutional rights invested in the matter of the trial by jury, the matter of challenge peremptorily being one of the laws

designed to aid each side alike to have a choice in the selection of a jury, the statute recognizes an equality to be followed in its execution. This must be if the purposes of a jury trial are to be carried through. This is a matter that concerns every citizen, and there can be no other conclusion than that the jury that tried this case was not selected fairly, legally and constitutionally. If the trial judge in this cause could exclude all members of a labor union, another judge could just as justifiably excuse all persons that were non-union members from sitting as trial jurors, and trial by jury would be meaningless. We submit, therefore, that the history of these Constitutional enactments and the legislation made for the purpose of carrying out the Constitutional provisions, like the plain wording in the Constitution, demonstrates an unequivocal purpose to prevent any encroachment whatever upon the citizens' rights in keeping inviolate the principal purposes expressed in the Constitution in the matter of selecting a fair and impartial jury.

The purpose the court below having always found and given effect heretofore, in this case, for an unsubstantial reason instead recognized the costs of a criminal trial below, and though having found that petitioners' rights had been violated, then the courts proceeded to nullify it by a wholly unwarranted resort to an inapplicable statute and an unwarranted and unreasonable construction of the Constitutional and statutory rights involved.

But the sole purpose of these Constitutional provisions and of the Legislative Acts in aid of these amendments, is to achieve the Constitutional and Legislative intent, and not to circumvent or frustrate it. The mechanical application of these rules as has been adhered to heretofore was in conformity with and not in opposition to the plain legal, constitutional and legislative intent. To hold otherwise

solely for the purpose of discrimination against these petitioners who happened to be laboring men and members of a labor union themselves is clearly a perversion of that purpose, the honorable trial Court having held that a member of any union, including hod-carriers or whatever, would be disqualified to sit as a trial juror (R. p. 32).

The Supreme Court of the State of Tennessee, therefore, should have reversed the trial court and found reversible errors upon the grounds assigned under Article I of the Assignments of Error. The Assignments, Brief and Argument presented, pertaining to the selection of the trial jury, are found on Record pages 29 through 35.

> The trial by jury has been considered in England and America as the most distinguishing badge of liberty. Bank of the State v. Cooper, 10 Tenn. 599.
>
> It is a fundamental guarantee of the rights and liberties of the people and is passed to us as the birthright of every free man. Dimick v. Schiedt, 293 U.S. 474, 1935.
>
> It was known and used in some form by the ancient Greeks but the forerunner of the jury system as we know it, was introduced into England by the Normans and was used principally by the early Kings as a quasi-administrative body. Gradually the jury developed from a body of informers or citizens from the neighborhood into what is supposed to be a body of twelve good and lawful men who stand wholly indifferent and impartial, to try the issues of fact according to the law and the evidence. Turner v. State, 128 Tenn., page 27.
>
> While the Federal Constitution is concerned with the guarantee of a trial by jury in the Federal Courts and does not at any place expressly guarantee the right of trial by jury in State Courts (Dimick v. Schiedt, 239 U.S. 74), the Fourteenth Amendment to

the Constitution supplies protections and safeguards where the right to trial by jury remains secure under state law.

CONCLUSION

For reasons heretofore stated in this brief, it is respectfully submitted that the judgment of the Supreme Court of the State of Tennessee admittedly based upon a finding of fact set out in the Supreme Court's opinion, is erroneous in law, is prejudicial and does not afford these petitioners due process of law and equality in the administration of the law and should be reversed.

Respectfully submitted,

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October 12, 1957.